



Attorney General

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Robert R. Corbin

April 23, 1990

Dona Marie Markley
Executive Director
Arizona State Board for
Private Postsecondary Education
1624 W. Adams, Room 110
Phoenix, Arizona 85007

Re: I90-039 (R89-158)

Dear Ms. Markley:

You have asked our opinion concerning the continued eligibility of any member of the Arizona State Board for Private Postsecondary Education (Board) who no longer meets the qualifications prescribed by law for the position occupied by the Board member. A.R.S. § 32-3002(A) prescribes that the Board must consist of the following seven members, appointed by the Governor:

1. Two members who hold executive or managerial positions in a private educational institution offering private vocational programs in this state.
2. One member who holds an executive or managerial position in a private educational institution offering an associate degree.
3. Two members who hold executive or managerial positions in a private educational institution offering a bachelor or higher degree, or both.

4. Two members who are citizens of this state and have been occupied in commerce or industry in this state for at least three years.

First, you asked whether a section 32-3002(A)(4) member, who qualified for service on the Board by occupation in commerce or industry in this state for at least three years, remains eligible for the position if the member becomes employed in a managerial position by a private educational institution, thus assuming qualifications of a section 32-3002(A)(1), (2) or (3) member. Second, you asked whether a Board member occupying a position reserved for executives or managers of vocational, associate-degree or bachelor's-degree institutions remains eligible for the position if the member is no longer employed by the type of institution specified in the statute; for example, when the institution changes from offering vocational programs to offering a bachelor or higher degree, or when the member becomes employed by a different type of institution. In response to both questions, we conclude that a Board member becomes unqualified for a position when the member no longer possesses the statutory requirements for occupying the position. Therefore, the member is subject to removal from office by the Governor or by a quo warranto court proceeding.

Generally, a person who lawfully enters an elective or appointive office is subject to removal from office if the person no longer possesses the qualifications required for holding the official position. Laos v. Arnold, 141 Ariz. 46, 49, 685 P.2d 111, 114 (1984). Accord, State v. Bohannon, 101 Ariz. 520, 524-525, 421 P.2d 877, 881-882 (1966) ("[W]here a constitution or statute creates a qualification for an office the subsequent loss of the qualification constitutes valid grounds for removal of the officer.")

Because A.R.S. § 32-3002(A) defines the qualifications of Board members according to the nature of their employment and employer, a loss of that status creates a lack of qualification for the position. In 1940, the Arizona Supreme Court rejected an argument that more than one member of a county board of supervisors could lawfully sit on a welfare board which, by statute, was required to be composed of one member of the board of supervisors and two citizen members. The Court held that permitting more than one member of the board of supervisors to sit on the welfare board "would nullify the clear provision that such board is to be composed of two citizen members and one member of the Board of Supervisors" McCarthy v. State of Arizona, 55 Ariz. 328, 334-335, 101 P.2d 449, 452 (1940). Like the welfare board in McCarthy, the Arizona State Board for Private Postsecondary Education must be composed of members who meet certain statutory qualifications relating to employment or

public office-holding. The loss of the qualification constitutes valid grounds for removal of the officer.^{1/}

Concerning the methods for removal of a unqualified Board member, we conclude that the Attorney General may institute a quo warranto action pursuant to A.R.S. § 12-2041,^{2/} which authorizes such a proceeding to determine whether a person, who lawfully entered an elective or appointive office, has subsequently become disqualified and should therefore be removed from the position. Laos v. Arnold. Also, because Board members serve "at the pleasure" of the Governor, they may be removed by the Governor without cause. A.R.S. § 32-3002(B); State v. Ingalls, 21 Ariz. 411, 415-417, 189 P. 430, 432-433 (1920) ("at the pleasure of the Governor" means that the appointed public officer may be removed at the discretion of the Governor, without cause).

Therefore, we conclude that a member is disqualified from continued service on the Board when a Board member, holding a position reserved for persons who have been occupied in industry or commerce for at least three years, accepts a managerial position with a private postsecondary institution;

^{1/}The disqualification does not operate as an automatic forfeiture of office under A.R.S. § 38-291, which provides that an office is "deemed vacant" when one of 12 events occur. See State v. Moore, 49 Ariz. 51, 64-65, 64 P.2d 809, 815 (1937) (holding that provisions of § 38-291 (formerly Rev. Code 1928 § 94) are exclusive with respect to a vacancy in office). The only circumstance listed in the statute which applies to the subject of this opinion is A.R.S. § 38-291(4), which provides that "[r]emoval from office of the person holding the office creates a vacancy."

^{2/} A.R.S. § 12-2041 provides:

A. An action may be brought in the supreme court by the attorney general in the name of the state upon his relation, upon his own information or upon the verified complaint of any person, in cases where the supreme court has jurisdiction, or otherwise in the superior court of the county which has jurisdiction, against any person who usurps, intrudes into or unlawfully [sic] holds or exercises any public office or any franchise within this state.

B. The attorney general shall bring the action when he has reason to believe that any such office or franchise is being usurped, intruded into or unlawfully held or exercised.

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when a Board member who represents a particular kind of private postsecondary institution changes his or her employment status; or when the institution employing a Board member changes its type of educational program (vocational, associate-degree or bachelors degree or higher). The Board member may be removed at the discretion of the Governor, or the Attorney General may bring a quo warranto court proceeding to oust the Board member.^{3/}

Sincerely,



BOB CORBIN
Attorney General

LSP:LPF:dlf

^{3/}We note that official acts of an unqualified public officer, acting under color of a valid election or appointment, are considered the acts of a de facto officer and are not invalidated by the officer's ineligibility. Rogers v. Frohmiller, 59 Ariz. 513, 522, 130 P.2d 271, 275 (1942); State v. Moore, 49 Ariz. at 64-65, 64 P.2d at 815.